United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Bpls

74-1517

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

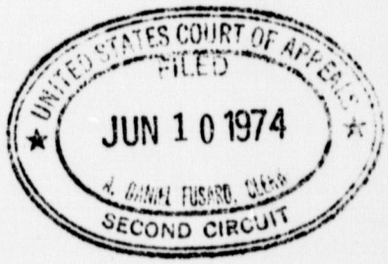
Appellee,

-against-

SALVATORE BADALEMENTE
and HERBERT YAGID,

Appellants.

Docket No. 74-1517



BRIEF FOR APPELLANT HERBERT YAGID

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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QUESTIONS PRESENTED

1. Whether the failure by the Government and the Judge to make the "Allen letters" available to defense counsel is error requiring reversal of the judgment.

2. Whether the trial judge abused his discretion by improperly excluding testimony relevant to appellant's defense of entrapment.

3. Whether the judge's charge failed to instruct properly with respect to the informer's credibility, appellant's credibility, the impropriety of drawing an unfavorable inference against appellant because of the accomplice's guilty plea, and the defense of entrapment.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) rendered on April 11, 1974, after a jury trial, convicting Herbert Yagid of conspiracy to transport a counterfeit savings bank passbook, in violation of 18 U.S.C. §§2314, 371, and of transporting a counterfeit savings bank passbook, in violation of 18 U.S.C. §§2314, 2.

Appellant was sentenced to imprisonment for two years each on the conspiracy and substantive counts, the sentences to run consecutively.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal,* pursuant to the Criminal Justice Act.

Statement of Facts

Appellant, along with co-defendants Salvatore Badalamente and Louis Stern,** stood trial for their alleged par-

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*At trial appellant was represented by retained counsel, Paul P. Rao, Jr., Esquire.

**Four other co-defendants -- Jerry Allen, Arthur Berardelli, James Feeney, and Leonard Turi -- pleaded guilty prior to trial.

ticipation in a scheme to obtain a counterfeit savings bank passbook for the purpose of pledging the passbook for a loan in Switzerland. The Government's case rested exclusively on the testimony of Herbert Olsberg, a paid FBI informer, who participated in the scheme, and of Jerry Allen, a co-defendant who pleaded guilty immediately prior to trial. Appellant sought to establish at trial that he was entrapped by Olsberg into joining the conspiracy and also that, after becoming a member, he withdrew from the plot prior to the commission of the substantive crime.

On May 23, 1974, during preparation of this appeal, counsel for appellant found several letters relating to co-defendant Allen in the files of the Clerk of the District Court: a letter from Allen to Judge Carter claiming harassment by the United States Attorney's office, received by the Judge on October 25, 1973;* a letter from Judge Carter to

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Le "Beau Rivage"
Lausanne-Ouchy
October 25, 1973

Judge Carter -

I have written a letter to Judge Gerfein [sic] - please your honor, forgive my violating protocol - but I have been terrorized by an Assistant U.S. Attorney named Ira Sorkin - and his side-kick, Tom Doonan. I stand indicted by Mr. Eberhardt on a case that will be heard before your Court - Mr. Eberhardt has acted in a proper way.

But Mr. Sorkin has insisted, using words and methods beyond rational belief-

United States Attorney Paul J. Curran, dated November 5,

---

that I tape and entrap a number of prominent people - "or he will crucify me" - tapes made without court authorization -

Unless I become his professional informer - Mr. Sorkin warned me - he would continue naming me in what he referred to as his "frivolous" indictments -

He has badgered my family - my friends - has insisted on seeing me without a lawyer - on many - many occasions -

When I finally exploded and told him that I would write to the court he said - "Don't bother - it won't help"

Respectfully,

JERRY ALLEN

P.S. Among those he wanted me to tape were Senator Javits - and Senator Harrison Williams -

He also insisted - in a rage - that I tape conversations with my own lawyer Marty Frank - (MU 7-8930)

I will stand before you, Your honor and swear as to the above statements -

I realize the unorthodoxy of writing directly to you - but I am at the breaking point - so much so, that I'm almost afraid to come home -

Again, my apologies

JERRY ALLEN

A Xerox copy of the original letter is attached as part of "D" to appellant's separate appendix. Emphasis in the original in all of the Allen letters transcribed.

1973;* a letter from Judge Carter to Allen, dated November 5, 1973;** and another letter, dated January 10, 1974, from

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* PAUL J. CURRAN, ESQ., November 5, 1973
U.S. Attorney

Jerome R. Allen (U.S.A. v. Allen et al - 73 CR. 471)

I enclose a xerox copy of a letter which is, I believe, from a defendant in a case now pending before me - U.S.A. v. Allen et al. (73 CR. 471). It is self-explanatory. While it is difficult for me to give any credence to the assertions in the letter, the possibility that they may be true cannot be dismissed out of hand.

I am, therefore, requesting that you investigate this matter to determine whether Mr. Allen's assertions have merit. I would, of course, appreciate and request that you report your conclusions of your inquiry to me as expeditiously as you can. Moreover, I would be grateful if that report is made to me by you in person.

I do not intend, by the latter statement, to express any underlying suspicion that something may be amiss. It merely seems to me that since the matter involved concerns the integrity of your office that it is something that requires your personal attention and personal assurance to me that whatever the conclusions of the investigation are they are endorsed by you personally.

** Mr. Jerome R. Allen
203 East 72nd Street
New York, New York 10021

Dear Mr. Allen:

I have requested the United States Attorney to look into the matter which you have brought to my attention and to submit

Judge Carter to United States Attorney Curran, reiterating his demand for an explanation of Allen's accusations.*

Counsel's investigation into the history of the letters revealed that Curran visited Judge Carter in camera on or about January 10, 1974, in response to the Judge's letter. Thereafter, and without informing trial counsel about the matter, Judge Carter let the issue drop. The letters remained in Judge Carter's files until after the trial, when they were forwarded to the Clerk of the District Court, without having been filed as part of the record.

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his conclusions to me. I shall advise you as soon as I hear from him.

Very truly yours,

* PAUL J. CURRAN, ESQ., January 10, 1974
U.S. Attorney

Jerome R. Allen (U.S.A. v. Allen, et al. - 73 CR. 471)

On November 5th I sent you a memorandum enclosing a xerox copy of a letter from the above-named defendant making various charges against his treatment by members of your staff. I asked you to investigate the matter and report to me. To date I have not even received the courtesy of an acknowledgment of the communication.

You may take this memorandum as being a renewal of my request of November 5th. Mr. Allen is apparently still in Switzerland but presumably he will return to the United States some time this month and will then be available for trial.

Further investigation uncovered the existence of six more letters written by Allen to various officials, all of which were in the possession of Assistant United States Attorney Michael Eberhardt, counsel for the Government at trial, or Assistant United States Attorney Ira Sorkin, counsel for the Government in other cases involving Allen. None of these letters, which detail a long, forceful attempt by Assistant United States Attorneys Sorkin and Thomas Doonan to force Allen to become a government witness, was made available to trial counsel pursuant to 18 U.S.C. §3500.*

At trial the Government relied primarily on the testimony of a paid FBI informer, Olsberg, who participated in the conspiracy and kept the FBI abreast of its progress.** Olsberg related that he met appellant and co-defendants Stern and Berardelli in late February 1973 in connection with a legitimate land transaction for which Olsberg purportedly was acting as a finder (67***). He stated that on or about

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*Xerox copies of the other six letters are attached as part of "D" to appellant's separate appendix and as exhibits at the end of this brief.

**Also testifying for the Government were FBI Agent James Maher, who supervised Olsberg and eventually seized the passbook, and Alexander Murray and Richard Wood, officers of the bank from which the passbook was stolen.

During the cross-examination of Maher, Judge Carter refused to let trial counsel delve into the past relationship between Olsberg and the FBI. Thus, counsel was prevented from discovering through Maher's testimony the motives, interest, and bias which could have affected Olsberg's credibility.

***Numerals in parentheses refer to pages of the trial transcript.

March 6, 1973, appellant solicited his assistance in a scheme to pledge for a loan a counterfeit savings bank passbook in the amount of $940,000 (72). According to Olsberg, appellant stated that he, Stern, Berardelli, and others were working to obtain the passbook and that Olsberg's role would be to get the loan in Switzerland (72-74).

Thereafter, Olsberg testified in detail to approximately thirty meetings concerning the passbook scheme which had taken place between March 6 and April 2, 1973, the date co-defendant Turi was arrested in possession of the passbook. Olsberg noted that Allen attended several of the early meetings, but that the principals at the majority of the meetings were appellant, Berardelli, and himself. Olsberg testified that the purpose of all the meetings and of several trips taken by various participants was to get possession of the passbook so that he could examine it and then take it to Switzerland. The passbook was ultimately brought, on April 2, 1974, by Turi into the Newark Airport. At that time he and the other defendants were arrested (28).

On cross-examination, counsel sought, among other things, to impeach Olsberg's credibility by exposing Olsberg's motives, interest, and bias based upon his longstanding relationship with the FBI. Judge Carter, however, refused to permit such questions (207-08).

The only other important evidence given at trial was taken from Allen, who related that Berardelli suggested

the scheme in Summer 1972 and again in February 1973 (216). Allen next testified that he and Berardelli sought assistance from appellant and Olsberg in early March for purposes of obtaining the European loan (318). Finally, he said that he attended several meetings in early and mid-March at which appellant, Berardelli, Stern, and Olsberg planned to obtain the passbook (320-23).

Appellant's defense consisted exclusively of his own testimony during which he sought to prove that he was entrapped by Olsberg into joining the conspiracy and that, after finally joining the plot, he withdrew prior to the commission of the substantive crime.

Appellant testified that he first met Olsberg in late January 1973 in connection with a land deal (380). He stated that Allen sought his assistance on the passbook deal as a favor in late February 1973, but that he refused to help Allen. He did, however, mention the matter to Olsberg on March 6, at which time, according to appellant, both men eschewed the idea (388). Appellant next related that Olsberg returned later that day and strenuously urged appellant to adopt the passbook scheme and to introduce him to Allen and Berardelli (397).

Thus, according to appellant, Olsberg dragged him into the plot, which appellant admitted finally joining on

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*Appellant did not know Berardelli, Turi, or Feeney before the passbook plot (376).

March 20, 1973 (509). Appellant claimed to have succumbed to Olsberg's pressure* because he feared losing the $30,000 commission on the legitimate land deal which he and Olsberg were helping consummate (398).

Appellant also testified that he withdrew from the conspiracy on April 1, prior to the commission of the substantive crime. Appellant related that on March 31 he and Olsberg flew to Chicago to meet Turi who had the passbook (475). Appellant, claiming that he feared detection, called off that meeting and immediately returned to New York (476-81). There, on April 1, he allegedly told Olsberg that he was through with the deal (482-85).**

Before the conclusion of the evidence, trial counsel submitted requests to charge. He requested, among other things, that Judge Carter instruct the jury that Allen's guilty plea should not be considered as evidence of appellant's guilt (362). The Judge declined to give the charge (363). Counsel also requested that Judge Carter instruct the jury that the testimony of the paid informer, Olsberg,

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*According to appellant, Olsberg not only threatened the land deal, but begged appellant's presence at the early meetings because he claimed to be afraid of Berardelli (397-407).

**There was much evidence to support appellant's assertion of his withdrawal. Olsberg talked to appellant and Berardelli separately several times on April 1, but Olsberg claimed that his recording device succeeded in capturing only his conversations with Berardelli (145-49). But even the transcripts of the talks with Berardelli (Government Exhibits #26-28) show that Berardelli knew that appellant had dropped out. In addition, Olsberg admitted that appellant did not even know that Turi was bringing the passbook to New York on April 2 (297).

be considered with special care. The Judge declined to so charge. Counsel next requested that, relative to the charge of entrapment, the Judge specifically state that the civilian informer, Olsberg, was a government "agent" whose actions could result in a legitimate defense of entrapment, and that the Judge refrain from alluding to the "innocent man" when explaining entrapment. Judge Carter refused to mention that Olsberg was a government agent; he also made several allusions to the "innocent man." Finally, trial counsel requested that Judge Carter instruct the jury that appellant's testimony should be considered like that of any other witness.* The Judge instructed, however, that appellant had the "supreme interest," and that his testimony should be considered with caution (625).

Following the complete charge, trial counsel reiterated the four requests to charge that, in his opinion, the Judge had improperly ignored. Judge Carter, however, refused to amend any of his instructions (622-25).

After deliberation, the jury found appellant guilty as charged.

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*Requests to Charge #5 (Entrapment), #9 (Informer's Testimony, and #10 (Appellant's Testimony) are annexed as "E" to appellant's separate appendix.

ARGUMENT

Point I

THE FAILURE BY THE GOVERNMENT AND THE JUDGE TO MAKE THE "ALLEN LETTERS" AVAILABLE TO DEFENSE COUNSEL IS ERROR REQUIRING REVERSAL OF THE JUDGMENT.

Attached as "D" to appellant's separate appendix and as exhibits at the end of this brief are seven letters* written by co-defendant Jerry Allen addressed to Judge Carter; to the Assistant United States Attorney in this case, Michael Eberhardt; and to the Assistant United States Attorney in other cases against Allen, Ira Sorkin.

The early letters portray an hysterical man under extreme pressure by the Government to become a government witness and informer:

> I have written a letter to Judge Gerfein [sic] - please your honor, forgive my violating protocol - but I have been terrorized by an Assistant U.S. Attorney named Ira Sorkin - and his side-kick, Tom Doonan. I stand indicted by Mr. Eberhardt on a case that will be heard before your Court - Mr. Eberhardt has acted in a proper way -
>
> But Mr. Sorkin has insisted,

---

*One letter, the second sent and addressed to Judge Carter, was found by appellate counsel in the files of the Clerk of the District Court. The other letters were given to counsel by Assistant United States Attorney Michael Eberhardt on May 31, 1974. Eberhardt refused to stipulate that the letters be made part of the record on appeal.

> using words and methods beyond rational belief - that I tape and entrap a number of prominent people - "or he will crucify me" - tapes made without court authorization -
>
> Unless I become his professional informer - Mr. Sorkin warned me - he would continue to name me in what he referred to as his "frivolous" indictments -
>
> Letter to Judge Carter received October 25, 1973.

Allen's claims of harassment were clearly detailed:

> Sorkin also "advised" me that he had embarrasing [sic] information as to my social life that he would "leak" to my family. He met with me .. alone .. at the Waldorf Astoria .... again soliciting my assistance: and asking for something which I cannot spell out in this letter.
>
> Letter to Solicitor General, forwarded to Sorkin, dated November 26, 1973.

The later letters, written after Allen succumbed to the pressure and agreed to cooperate, are disoriented and depressed, but still demonstrate that he was under pressure from someone:

> ... Although I have been in over thirty countries, my instincts can't be [illegible] - I would gladly trade a dinner at Maxim's in Paris, for a Nathan's frankfurter, and a day at Shea Stadium to a stroll on the Champs-Elysee -

> The pressure being exerted upon me by certain people in the States - "asking" me not to return has taken on Gargantuan proportions. I have never operated on D'onofria's scale, so why should I become a world gypsy? And so a toast, to the "Young Man That Was."
>
> Letter to Sorkin, dated December 22, 1973.

At the time of trial, Judge Carter was, of course, aware of the letter addressed to him, and Ebernardt knew of the letter sent to him and the one sent to the Judge. Yet neither Judge Carter nor Eberhardt made the letters within their possession available to defense counsel.*

It should have been obvious to the Judge and to Eberhardt that these letters, replete with hysterical claims of coercion, were of critical importance to the fair cross-examination of Allen.** The letters indicate that Allen was either under extreme pressure from the United States Attorney's office to testify, whether truthfully or not, or that he was either a liar or deranged. In any event, counsel should have been able to use the letters as he thought best (Alderman v. United States, 394 U.S. 165, 182 (1969)), and

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*This information was obtained from the following sources: Paul P. Rao, Jr., Esquire, trial counsel to appellant, on May 24 and 28, 1974; and Assistant United States Attorney Michael Eberhardt, on various occasions.

**Allen was the only witness at trial to corroborate the informer's version of what occurred at the early stages of the alleged conspiracy. Thus, his testimony was crucial to a determination of appellant's entrapment defense.

the failure to give them to trial counsel is error requiring reversal.

Eberhardt's actions violated his responsibility under 18 U.S.C. §3500.* The identical failure to hand over a letter damaging to the credibility of a key witness was held reversible error in United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir. 1974).**

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*Eberhardt was responsible not only for the two letters in his possession, but also for the letters in files of other cases involving Allen at or about the same time. United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir. 1974).

**If anything, the Allen letters were of more importance than the Lipsky-Morvillo letter. Counsel for Pacelli was given several letters and much other material damaging to Lipsky's credibility. Here, trial counsel was completely frustrated in his attempt to probe for Allen's possible perjury. Trial counsel tried valiantly to explore Allen's motives and bias and succeeded in making Allen say that he was reluctant to testify against appellant until a few days before trial:

> ALLEN: I didn't discuss cooperation on this case for a very good reason. I discussed cooperation on SEC cases with Mr. Sorkin and Mr. Sorkin asked me if I would cooperate with the Government in this case, and I was quite reluctant to do so.
>
> RAO: Then what did you decide to do, sir?
>
> ALLEN: I decided later last week, early this week, that I would cooperate with the Government.
>
> (333).

Lacking the letters, however, counsel was unable to probe deeper into the relationship between Allen and Sorkin.

> Accepting the government's assertion that these nondisclosures were inadvertent, we cannot agree with its characterization of them as "harmless error." Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial, none of this information conveyed quite so forcefully as Lipsky's letter to Morvillo the desparate state of Lipsky's mind after he had caused a mistrial by perjuring himself in the previous narcotics prosecution against Pacelli. The letter, furthermore, contains a blatant lie to the effect that his perjury, which caused the mistrial, had been unintentional rather than deliberate. Appellant's counsel would probably have sought to make this letter the "capstone" of his attack on Lipsky's credibility, and argued that it revealed a frantic -- even mentally disturbed -- person who was ready to tell any lie to anyone in order to save himself from a murder conviction in the state court. Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial.
>
> Citation and footnotes omitted.

See also United States v. Pfingst, 477 F.2d 177, 194-95 (2d Cir. 1973); United States v. Mayersohn, 452 F.2d 521, 526 (2d Cir. 1971); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969).

Judge Carter's decision to confer in camera with United States Attorney Curran, and then to drop the matter

without informing trial counsel, was a breach of judicial ethics as well.* United States v. Persico, 349 F.2d 6, 13 (2d Cir. 1965); Canon 3A(4) of the Code of Judicial Conduct.** Furthermore, since the Judge has demonstrated that he failed to perceive the importance of Allen's letter to him, and also failed to comprehend the necessity of informing trial counsel about the matter, it would be fruitless to seek a new trial in the District Court. Thus, this Court is the proper forum for resolving the issues at this time.

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*It was also a breach of professional ethics for the United States Attorney to consult privately with Judge Carter on such an important matter. Disciplinary Rule 7-110, Code of Professional Responsibility (1970) (DR7-110(B)): "In an adversary proceeding, a lawyer shall not communicate ... as to the merits of the cause with a judge...."

**Canon 3A(4), Code of Judicial Conduct:

> A judge should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding....
>
> Reporter's Notes to Code of Judicial Conduct, at 11 (1973).

Point II

THE TRIAL JUDGE ABUSED HIS DISCRETION BY IMPROPERLY EXCLUDING TESTIMONY RELEVANT TO APPELLANT'S DEFENSE OF ENTRAPMENT.

A. The trial judge improperly refused to permit trial counsel to examine the relationship between Olsberg and the FBI in order to demonstrate Olsberg's bias and interest.

The Government's case rested primarily on the testimony of Olsberg, the paid FBI informer. Thus, Olsberg's credibility, bias, and interest were critical to the determination of the case. Judge Carter, however, refused to permit the "full and fair cross-examination [which] is the cornerstone of the adversary system," United States v. Fitzpatrick, 437 F.2d 19, 23 (2d Cir. 1970).

In an attempt to discredit the testimony of Olsberg, defense counsel sought to interrogate the principal case agent to expose the longlasting relationship between Olsberg and the FBI. Judge Carter, however, prevented counsel from eliciting this critical testimony through Agent Maher:

MR. RAO: When was the first time you had contact with Mr. Olsberg?

MR. EBERHARDT: Objection, as outside the scope of direct examination.

THE COURT: Objection sustained.

MR. RAO: In connection with your investigation in this matter, did you have occasion to have contact with Mr. Olsberg?

MR. EBERHARDT: Objection.

THE COURT: Objection sustained.

MR. RAO: May I approach the bench?

THE COURT: No.

(40).

After the judge refused to accept similar questions, trial counsel suggested that he later make an offer of proof. During the next recess, trial counsel stated:

MR. RAO: During the cross-examination of Agent Maher, what defense attorney wanted to establish was (A) Who were the assistants who handled this case prior to Mr. Maher obtaining the supervisory capacity of the case.

Secondly --

THE COURT: You were advised there was no one. He started the case.

* * *

MR. RAO: I also wanted to ask him his meetings with Mr. Olsberg, how many times he met him, if to his knowledge whether or not he knew that other agents within the bureau had met with Mr. Olsberg, and all of this was for the purpose of establishing that prior to the time that Mr. Maher dealt with Mr. Olsberg, he, Mr. Olsberg, already had a working relationship with the FBI so as to go to the relevancy, materiality and competency of the defense of entrapment.

(103-04).

At that point, Judge Carter apparently recognized the legitimacy of trial counsel's claim:

THE COURT: All right. You are at liberty and will be at liberty to raise those questions and make that inquiry of Mr. Olsberg.

(104-04(a)).

Thus, in the first instance, the Judge gave trial counsel permission to inquire of Olsberg himself concerning his bias and interest. However, when Olsberg took the stand, Judge Carter, on his own volition, refused to allow trial counsel to cross-examine about the past relationship between Olsberg and the FBI:

MR. RAO: Who was the first agent you contacted in your cooperation with the FBI?

THE COURT: I don't see how that has any relevance to this case.

MR. RAO: Does your Honor

wish me to explain why?

THE COURT: I don't want any explaining. In spite of the fact the Government has not objected, I think that question is improper.

* * *

MR. RAO: After you were arrested on a violation of your parole, did you appear on February 13, 1973 when your matter came up in court -- excuse me, Mr. Olsberg.

Did you appear in court on September 14, 1972?

MR. EBERHARDT: I will object to the inquiry of this parole violation on cross-examination of Mr. Olsberg on the simple ground of relevancy.

THE COURT: I would agree with that. You have asked him and he has indicated and he brought out on direct he violated his parole. Whether he appeared and so forth, he told you he violated his parole and you can ask him in that connection.

MR. RAO: May I explain to the Court why I am asking these questions?

THE COURT: I don't want an explanation.

(207-08).

In this manner, Judge Carter refused to permit trial counsel to explore the favors done and promises made by the FBI in Olsberg's behalf in return for his testimony.

This Court has often had occasion to remark that it is

> ... substantial error to restrict cross-examination aimed at uncovering prior misconduct and at showing lenient treatment by government officials prior to pro-prosecution testimony at defendant's trial.
>
> United States v. Padgent, 432 F.2d 701, 705 (2d Cir. 1970).

See also Gordon v. United States, 344 U.S. 414, 422-23 (1953); Alford v. United States, 282 U.S. 687 (1931); United States v. Wolfson, 437 F.2d 862, 874-77 (2d Cir. 1970); United States v. Lester, 248 F.2d 329, 334-35 (2d Cir. 1957); McCormick, EVIDENCE 82 (1954); 3 Wigmore, EVIDENCE §97 (3d ed. 1940). Here, trial counsel was prevented from "bring[ing] out considerations relevant to motive and bias," United States v. Mahler, 363 F.2d 673, 677 (2d Cir. 1966), which were crucial to determining Olsberg's credibility. See also United States v. Birrell, 447 F.2d 1168, 1171 (2d Cir. 1971); United States v. Masino, 275 F.2d 129, 132 (2d Cir. 1960); cf. United States v. LaSorsa, 480 F.2d 522, 529 (2d Cir. 1973); United States v. Miles, 480 F.2d 1215, 1217 (2d Cir. 1973).

That Judge Carter abused his discretion in preventing trial counsel from questioning Maher and Olsberg is clear:

> [The] test for abuse of discretion is whether the jury was otherwise in possession of sufficient information concerning formative events to make a "discriminating appraisal"

of a witness' motives and bias.

> United States ex rel. Lucas v. Regan, 365 F.Supp. 1290, 1294 (E.D.N.Y. 1973), quoting from United States v. Gordon, supra, 344 U.S. at 417, and United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970).

The success of the Government's case rested exclusively on the "inherently suspect" (United States v. Padgent, supra, 432 F.2d at 705) testimony of a paid informer and an accomplice. The cross-examination of this witness was the critical way to disclose factors affecting the probability that the witness was telling the truth. There was no way other than the testimony of Maher and Olsberg for counsel to discover Olsberg's motives and bias. United States ex rel. Lucas v. Regan, supra. The Judge's limitation of the cross-examination of Olsberg deprived appellant of a fair trial.

B. The trial judge improperly refused to permit appellant to testify about a conversation between him and co-defendant Stern.

During his direct examination, appellant Yagid testified about a March 7, 1973, meeting with Olsberg, Berardelli, and Stern. According to the Government's theory of the case, appellant and Stern were then active members of the conspiracy. On the other hand, appellant's defense was that at that time

he was being entrapped by Olsberg into joining the conspiracy. Critical to appellant's entrapment defense were his state of mind and events which occurred during and after that May 7 meeting, but Judge Carter refused to permit trial counsel to ascertain what was said at the meeting, and thus to develop the defense fully.

Appellant testified that Olsberg, Allen, and Berardelli left the meeting. Then defense counsel sought to have appellant relate a conversation between him and Stern in which they expressed disapproval of the passbook scheme. Thus, Mr. Rao asked:

> Q. Then did you have a conversation with Mr. Stern, and if so, what was that conversation?
>
> A. After a few minutes, he left. He departed from the baths. He thanked me, and I then spoke to Louis --
>
> MR. EBERHARDT: Objection as to any conversation with Mr. Stern out of the presence of Mr. Olsberg.
>
> MR. RAO: Mr. Olsberg is not a defendant, nor is he a co-conspirator. The defendant can testify to a conversation with a defendant....
>
> (At the bench).
>
> * * *
>
> MR. RAO: [Mr. Stern] doesn't have to [take the stand].
>
> THE COURT: Of course he doesn't, but the issue is, if he is not going to take the stand, Mr. Eberhardt

says that any conversation he may have said therefore becomes irrelevant because, as a matter of fact, he can't make inquiry of him. You are introducing evidence about what he is supposed to have said, then the man doesn't take the stand.

MR. RAO: Because this is the very exception to the hearsay rule.

(410-11).

Judge Carter's exclusion of the proffered testimony is inexplicable.* Counsel sought to have this conversation admitted under the co-conspirator hearsay rule, a well-recognized exception to the general rule of exclusion. United States v. Cirillo, Doc. No. 73-2426 (2d Cir. May 7, 1974); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir.), cert. denied, 397 U.S. 1028 (1969); Glasser v. United States, 315 U.S. 60, 74 (1942); 4 Wigmore, EVIDENCE §1079 (Chadborn rev. 1972). Under this theory appellant could properly testify about this conversation between Stern and himself regardless of whether the informer Olsberg, who was not accused in this case, was present. Since appellant's testimony was admissible under the exception, Stern's decision as to whether to take

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*The judge's ruling understandably confused defense counsel:

MR. RAO: Then why can't Mr. [Yagid] [testify]?

THE COURT: Because of the fact that at this point you are in control of the witnesses that they are testifying about in terms of what their conversations are.

MR. RAO: I am in control of the witnesses? I lost you on that one, sir.

the witness stand in his own behalf was irrelevant. Judge Carter's ruling forced trial counsel to lose invaluable testimony about appellant's state of mind. In effect, if Stern did not testify, Judge Carter's ruling prevented trial counsel from successfully rebutting the Government's suggestion that appellant and Stern were active members of the conspiracy at and about the time of that meeting and from establishing entrapment.

Point III

THE JUDGE'S CHARGE FAILED TO INSTRUCT PROPERLY WITH RESPECT TO THE INFORMER'S CREDIBILITY, APPELLANT'S CREDIBILITY, THE IMPROPRIETY OF DRAWING AN UNFAVORABLE INFERENCE AGAINST APPELLANT BECAUSE OF THE ACCOMPLICE'S GUILTY PLEA, AND THE DEFENSE OF ENTRAPMENT.

A. The Informer's Credibility

The Government's case rested primarily on the mostly uncorroborated testimony of Herbert Olsberg, a paid FBI informer. Thus, the trial judge had a special obligation to give proper instructions to the jurors as to how to evaluate Olsberg's credibility:

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled ... to have the issues submitted to the jury with careful instructions.
>
> On Lee v. United States, 343 U.S. 747, 757 (1952).

To assist the jury in evaluating the informer's credibility, trial counsel submitted a proposed instruction which properly focused on the informer's special interest.*

---

*The language of trial counsel's Request #9, approved

Although Judge Carter told counsel he would give the requested instruction "in substance," his charge nevertheless failed to highlight "special interest" (United States v. Hill, 470 F.2d 261, 365 (D.C. Cir. 1972)). Instead of advising the jurors "[t]hat [Olsberg] was a paid informant whose testimony must be examined with greater scrutiny than the testimony of an ordinary witness," United States v. Masino, 275 F.2d 129, 131 (2d Cir. 1960),* Judge Carter told them:

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by this Court and other authorities, was as follows:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage as to other crimes charged against him, must be examined and weighed by the jury with greater care and scrutiny than the testimony of an ordinary witness (United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960)). The jury must determine with careful scrutiny whether the informer's testimony has been affected by such interest, financial or otherwise, against the defendant. Federal Jury Practice & Instruction, Devitt & Blackmore, Volume I, Sec. 12.02, page 255. Jury Instructions in Federal Criminal Cases, LaBuy, Sec. 608, page 50.

*The importance of this cautionary instruction was recently highlighted when the First Circuit ruled that when the Government's case rests heavily on the testimony of an informant the special instruction on interest must be given whether requested or not. United States v. House, 471 F.2d 886, 888 (1st Cir. 1973). See also United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973); United States v. Grimes, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971), on the critical importance of mentioning that the informant was paid by the FBI.

There has been testimony by Mr. Olsberg, an individual commonly known as an informant or an informer. The law permits the use of informers, provided the rights of a defendant are not violated and, therefore, whether or not you approve of the use of informers should not enter into your deliberations.

You are required, however, to consider the credibility of this witness and to do this you must use the guidelines which I gave you earlier.

The fact that a person has been convicted of a serious crime, especially one bearing on his veracity, may be considered by you as bearing on his credibility as a witness in this case.

You may consider whether Mr. Olsberg's testimony was a fabrication, inspired by his own motives or self-interest or personal advantage or induced by a promise or a hope or an expectation of favorable consideration by the Government in connection with these or other matters. You should also consider whether Olsberg's testimony was motivated by any hostility towards the defendants.

Once again, I must remind you that merely because Olsberg may have been previously convicted or had an interest in this case or was hostile to a defendant does not mean his testimony was not truthful and candid. Those factors indicate that you should view his testimony with caution, but you must determine the weight to

> be given to his testimony based on whether or not, and to what extent, he is to be believed.
>
> (596-97).

Not only did Judge Carter fail to focus properly on the informant's special interst, but he specifically stated that when considering Olsberg's credibility, "You must use the guidelines which I gave you earlier" (597). Since the earlier instructions referred to the evaluation of the credibility of witnesses generally (see 592-94), the instruction was contradictory to the charge that dealt specifically with informers' testimony, leaving the jury without a standard for evaluating Olsberg's credibility. Judge Carter's advice to "consider whether Mr. Olsberg's testimony was ... inspired by his own motives or self-interest ..." (597), was ineffective to obviate his erroneous instructions on Olsberg's credibility because this language fails to state specifically that Olsberg had a "special interest" (United States v. Hill, supra, 470 F.2d at 365), requiring special caution when considering his testimony.

At the conclusion of the charge, trial counsel attempted to point out these defects and requested curative instructions. Judge Carter refused to listen to counsel:

> MR. RAO: Your Honor, firstly, relative to the testimony of the informer, "you are required to consider the credibility of this witness and to do this, you must use a guideline which I gave you

> earlier." I respectfully submit that the guideline which you gave earlier was an ordinary witness and --
>
> THE COURT: Come on. That charge is perfectly legal. I have given the guidelines with regard to that. Don't waste my time with that.
>
> (623).

Thus, Judge Carter refused to instruct properly on Olsberg's credibility. This failure was especially important in this case because the Government relied almost exclusively on Olsberg's testimony to convict appellant.

B. Appellant's Credibility

Appellant testified extensively: he sought to establish that he was entrapped into participating in the conspiracy and that, after finally joining it, he withdrew from the scheme before the commission of the substantive crime. Consequently, since appellant's credibility was a major issue for the jury, trial counsel submitted the following request to charge:

> A defendant who wishes to testify is a competent witness, and the defendant's testimony is to be judged in the same way as that of any other witness. Federal Jury Practice and Instructions, Sec. 12.11.

Judge Carter ignored trial counsel's request, and gave this charge instead:

> The law permits a defendant to testify in his own behalf if

> he wishes to do so. Mr. Yagid elected to testify. The testimony of a defendant must be considered by you as would the testimony of any other witness. You must determine the credibility of a defendant who testifies and in so doing, you must consider the deep personal interest which every defendant has in the outcome of his case. Indeed, it is fair to say that any defendant has the greatest stake in the outcome. The defendant's interest in the result of his trial is of a character possessed by no other witness. That interest requires that you receive such testimony with caution and in appraising its credibility, you may take the defendant's supreme interest into consideration.
>
> However, it by no means follows that simply because a person has a valid interest in the end result, he is not capable of telling a truthful, candid and straightforward story. It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.
>
> (620-21).

This instruction is highly objectionable. Whereas the cases permit some comment on the defendant's special interest,* no court has ever approved a charge where the

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*Recently, several circuits have cautioned their district judges against singling out the defendant's interest for special attention. United States v. Hill, supra, 470 F.2d at 363; United States v. Brown, 453 F.2d 101, 107 (D.C. Cir. 1971), cert. denied, 92 S.Ct. 1205 (1972); United States v. Haney, 429 F.2d 1282, 1284 (5th Cir. 1970).

terms "deep personal interest," "greatest stake in the outcome," "interest ... possessed by no other witness," and "supreme interest" appear within the space of one breath. In Reagan v. United States, 157 U.S. 301 (1895), in which the Supreme Court sanctioned some comment, the charge was substantially less emphatic than the present charge:

> You should especially look to the intesrest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.
>
> Id., at 304.

This Court, in adhering to Reagan, has allowed some instruction on the defendant's interest, but an examination of the cases demonstrates that no charge as extreme as Judge Carter's has ever been approved. In United States v. Sullivan, 329 F.2d 755 (2d Cir.), cert. denied, 377 U.S. 1005 (1964), this Court sanctioned the following:

> In this case, the defendant testified. There was no obligation or compulsion of the defendant to testify, but when he takes the stand and does testify, he is tested by all the same rules and guides that any other witnesses are tested by. You know that, of course, the defendant is interested -- vitally interested -- in the outcome of a case, his case. That is not to say anyone who is interested in the case necessarily lies, but it is a fact you must take into consideration. A man that is interested in the outcome of a case might see things differently. You and I do it sometimes consciously and sometimes unconsciously. We see things differently when we are interested in an event.
>
> Id., at 756-57.

See also United States v. Mahler, supra, 363 F.2d at 678.

Not only was Judge Carter over-zealous in spotlighting appellant's interest, but he also erroneously advised:

> [The defendant's] interest requires that you receive such testimony with caution....
>
> (620).

This instruction, explicitly stating that appellant's testimony was inherently untrustworthy, was error, at least in this case, since Judge Carter refused to instruct the jury on the special caution to be used when evaluating the testimony of an informer against whose testimony appellant's testimony would be balanced. United States v. Salas, 387

F.2d 121, 122 (2d Cir. 1967); On Lee v. United States, supra. The special "caution" language could not be obviated by bland, boilerplate references to general fairness standards. United States v. Masino, supra.

Following the complete charge, trial counsel objected to the focus on the defendant's interest and on the special caution instruction. Judge Carter again turned a deaf ear:

> MR. RAO: You stated he has the greater stake in the outcome and that is, defendant's interest is of supreme interest, and that his testimony should be treated with caution.
>
> THE COURT: I don't think I said "supreme," did I?
>
> MR. RAO: Yes. I respectfully request that a charge about a defendant, his testimony should be treated as any other witness, and there should be no caution relative to his testimony.
>
> THE COURT: That is denied.
>
> (625).

The Judge committed serious error by excessively highlighting appellant's "supreme interest" and urging caution, especially since he refused to mention the special interest of Olsberg. The factual issues in the case, the formation of the conspiracy and appellant's entrapment and withdrawal, essentially turned on the competing credibilities of appellant and Olsberg. Judge Carter's instructions, so

heavily weighted against appellant, prevent the jurors from fairly considering the conflicting testimony of appellant and Olsberg.

C. The Impropriety of Drawing an Unfavorable Inference Against Appellant Because of the Accomplice's Guilty Plea

Jerry Allen, an accomplice in the conspiracy, entered a guilty plea shortly before trial, became a government witness, and gave damaging evidence against appellant. Consequently, defense counsel took great care to request a proper instruction on the meaning of Allen's guilty plea in relation to appellant's plea of not guilty. At the opening of court on the fourth day of trial, counsel made this request:

> If your Honor please, at this time insofar as Mr. Allen, who was a defendant in this case, has testified and has said that he did plead guilty, I respectfully request the Court to advise the jury that the fact that Mr. Allen who was a defendant and pled guilty, is not evidence of guilt of any other defendants on trial here, and does not give rise to any inference against any defendant on trial.
>
> (362).

Judge Carter denied counsel's request to give the "no inference of guilt" charge:

> I told you what I am going to tell the jury in regard to that, that each individual has to be considered on their own.
>
> (363).

The accomplice charge, as later given to the jury, excluded the requested instruction.*

---

*Judge Carter's charge on accomplice testimony read as follows:

> The Government also called as a witness Jerry Allen, who, if his testimony is to be accepted, was an accomplice in the crimes charged against the defendants in this case.
>
> In the prosecution of crime, the Government is frequently called upon to use witnesses who are accomplices. Often it has no choice. The Government must rely upon witnesses or transactions as they are.
>
> The fact that Allen has been convicted of a serious crime, especially one bearing on his veracity, may be considered by you as bearing on his credibility as a witness in this case.
>
> There is no requirement in the federal courts that the testimony of an accomplice be corroborated. The Government contends that Jerry Allen's testimony is corroborated by other evidence with respect to several key portions of his testimony. However, even without such corroboration, conviction may rest upon the testimony of an accomplice, if you believe it and find it credible. It does not follow that because a person has acknowledged participation in the crimes charged against the defendant

After the conclusion of the charge, trial counsel reiterated his request on this point; nonetheless, Judge Carter refused to give a corrective instruction (623-24).

The Judge's failure to give the "no inference of guilt" charge was error. This Court has often approved that instruction:

> The trial court adhered to the proper practice in cautioning the jury by saying, "Let me point out that the fact that the [co-defendants] pleaded guilty is no proof whatsoever of the guilt of the two defendants who are on trial and that must be put out of your mind in determining the guilt or innocence

---

> that he is incapable of giving a true version of what he testified to in the case on trial.
>
> His testimony, however, should be viewed with caution and scrutinized with care. The fact that a witness is an accomplice may be considered by you as bearing on his credibility. Was his testimony inspired by any motive of reward, of self-interest, or hostility to the defendants so that he gave false or colored testimony against them in this court before you? If you find that it was, you ought, unhesitatingly, to reject it.
>
> However, after a cautious and careful examination of the accomplice's testimony and his demeanor upon the witness stand, if you are satisfied that he told the truth here as to certain events, there is no reason why you should not accept it as credible and act upon it accordingly.

(597-99).

> of these two defendants, the Aronsons.
>
> United States v. Aronson, 319 F.2d 48, 52 (2d Cir.), cert. denied, 375 U.S. 920 (1963).*

See also United States v. Light, 394 F.2d 908, 914 (2d Cir. 1968); United States v. Grazione, 376 F.2d 258, 259 (2d Cir. 1967); United States v. Edwards, 366 F.2d 853, 870 (2d Cir. 1966); United States v. Mahler, supra, 363 F.2d at 678; cf. United States v. Bellamy, 436 F.2d 542 (2d Cir. 1971); United States v. Crosby, 294 F.2d 928, 948 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), affirmed, 311 U.S. 205 (1940).

The failure to give the "no inference" charge was especially prejudicial in this case. Allen was the only witness to corroborate at least part of Olsberg's story. He introduced several of the alleged co-conspirators and claimed to have observed appellant participate in the early planning stages of the scheme. Appellant, however, testified that he was very reluctantly drawn into the conspiracy by Allen. Thus, a proper understanding of his guilty plea in relation to appellant's defense was of the utmost importance.

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*This rule is followed by other circuits, e.g., United States v. Farley, 482 F.2d 53, 58 (10th Cir. 1973); United States v. Davis, 439 F.2d 1105 (9th Cir. 1971); Fahning v. United States, 299 F.2d 579, 580 (5th Cir. 1962); Wood v. United States, 279 F.2d 359, 262 (8th Cir. 1960).

D. The Charge on Entrapment

Appellant's defense to the conspiracy charge was entrapment. A proper entrapment instruction was essential for a fair trial. Judge Carter, however, erroneously charged on two important points contrary to trial counsel's requests to charge. First, the Judge failed to outline the defense theory of entrapment -- that Olsberg, though a civilian informer, was a government "agent" who could legally entrap appellant into the conspiracy. Second, he gave the "innocent person" charge.

Fearing that the jurors would understand government "agent," "officer," and "employee" to exclude Olsberg, defense counsel, in his requests to charge, suggested a feasible instruction for clarifying Olsberg's role in the entrapment defense:

> ... The defendants Yagid and Stern assert they were induced, or persuaded, or incited, or lured, to violate the law by the conduct of Olsberg, the government agent, both by Olsberg's conduct in direct discussions with Yagid and thereafter with Stern and also by Olsberg's utilization of the New Jersey land venture, the C. W. Deaton financing, and the letter of credit transactions in California, as well as the Stutz motor car loan, as a means to apply pressure on Stern and Yagid [citation

omitted] to commit the crime charged.[*]

Nevertheless, Judge Carter refused to explain to the jury that the defense claimed that appellant was entrapped by a paid government agent. Rather, the Judge confusingly interchanged the terms "law enforcement officer," "government employee," and "government agent," without specifying who exactly he was referring to:

> A basic feature of entrapment is that the idea or design of committing the crimes originated with a law enforcement officer rather than with a defendant; that the defendant had no previous disposition, intent or purpose to commit the alleged offenses, and that the law enforcement officer or Government employee implanted in the mind of an innocent person the disposition to commit the alleged offense and instigated and incited its commission in order that the defendant might be arrested and prosecuted.
>
> If you find that an agent or employee of the Government merely afforded a favorable opportunity or facilities to the defendant for the commission of the alleged crime, such conduct on the part of the Government does not constitute entrapment. Entrapment would occur only if you find that the Government agents induced the defendant to commit the crime charged in the indictment and that the

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*For the entirety of Request to Charge No. 5 (Entrapment), see "E" to appellant's separate appendix.

> criminal conduct of the defendant was the product of the Government's activity.
>
> If you find any credible evidence creating the reasonable possibility that a Government agent or employee instigated and incited or otherwise induced the defendants to commit the crime charged, then the Government must prove beyond a reasonable doubt that such inducement was not the cause ... of the crime....
>
> If the prosecution has satisfied you ... that the defendant was ready and willing to commit the offense charged, but was awaiting a favorable opportunity to commit the offense, ... you may find that the Government has not seduced an innocent person or persons, but has only provided the means for the defendant to effectuate his own then existing purpose.
>
> (618-19).

This rambling, circular instruction could only have confused the jury. Much preferable was trial counsel's clearly worded request. United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952).

Following the entire charge, trial counsel tried to tell Judge Carter about the informer-entrapment problem. At first, the Judge claimed to have given the proper instruction, but when counsel differed, the Judge dropped the matter:

> MR. RAO: ... I don't know whether or not the jury will

understand, in your charge, where you say the crimes originated with a law enforcement officer rather than a defendant, law enforcement officer or Government employee. I think it should be specific that law enforcement officer is also considered Mr. Olsberg.

THE COURT: I have told the jury that when I said he was an informer.

MR. RAO: I submit I don't think it was.

THE COURT: All right. Next?

(624).

Also in his request to charge on the issue of entrapment,* trial counsel specifically urged Judge Carter not to allude to the "otherwise innocent person," which reference was condemned by this Court in United States v. Morrison, 348 F.2d 1003 (2d Cir.), cert. denied, 382 U.S. 905 (1965). The Judge, however, used the terms "innocent persons" or "unwary innocents" four times, including twice within two sentences:

Manifestly, that function does not include the manufacturing of crime. The defense

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*Trial counsel's request was made in a footnote to page three of his entrapment request:

N.B. United States v. Morrison, 348 F.2d 1003, 1005 (2d Cir. 19). Allusion to otherwise "innocent person" should be avoided.

> of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.
>
> (618).

The rationale for avoiding allusions to the "innocent person" are clear. As this Court noted, in United States v. Morrison, supra, the defense of entrapment is not a claim of "innocence," but of excusable wrongful behavior. Id., at 1005.

When, following the complete charge, trial counsel reminded the Judge of the "innocent person" problem, the Judge made no response (624).*

The cumulation of errors in the Judge's instructions prevented the jury from fairly considering the issues in this case. By excessively spotlighting appellant's "supreme interest" and urging caution, without similarly warning about Olsberg, the Judge undermined appellant's credibility and bolstered Olsberg's credibility, thus prejudicing appellant's claims of entrapment and withdrawal. Judge Carter's refusal to warn the jurors that no inference of guilt against appel-

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*In United States v. Morrison, supra, this Court affirmed the conviction despite the erroneous instruction because counsel had neither proposed an instruction nor objected. Here, reversal is required, for counsel made a proper request and a timely objection.

lant should be drawn from Allen's guilty plea was especially prejudicial in this case, because Allen testified and gave damaging evidence against appellant. The instruction on entrapment prejudiced appellant in two ways: The Judge refused to enunciate the defense theory that Olsberg was a government agent who could entrap appellant; and the Judge insisted on alluding to the entrapment of an "innocent man" when appellant did not claim innocence, but excusable wrongful behavior. Thus, the cumulation of errors in the Judge's instructions requires reversal of the judgment. United States v. Masino, supra, 275 F.2d at 131.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Attorney for Appellant
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Foley Square
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(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel

June 7, 1974

EXHIBITS

LETTER #1, FORWARDED TO
THE UNITED STATES ATTORNEY BY
THE SOLICITOR GENERAL

Le "Beau Rivage"
Lausanne-Ouchy
29-017-51
Monday

Robert H. Bork
Attorney General
Department of Justice
Washington, D.C.

At present, I am under 2 indictments in the Southern District - both of which Ira Sorkin has labeled as being "frivolous."

I am going to conduct a press conference here - detailing the methods used by some (Tom Doonan for example) of your investigators -

When I refused (without a court order) to [unclear, possibly "trap"] and "tape" - a number of key people - including my own lawyer - Marty Frank MU 7-8930 -

Sorkin named me -

I am not a paragon of virtue - when I refused to "tape" Roy Cohn for Morgenthau, I was actually named (1963 - Terminal Haden) for allegedly receiving $150 - in an indictment - that Judge Tyler dismissed -

It is almost a Kafka-like nightmare -

I cannot go home - Sorkin has even threatened to have "narcotics" planted on my - on my apartment - if I refuse to "work" with him -

I have only glossed over details; the substance of what I have charged - will be proven - at my press conference -

You can contact me by writing to

c/o Hotel Savoy
Zurich

Respectfully,

JERRY ALLEN

Among the people Sorkin wanted me to tape was Senator Harrison Williams -

I have notified the N.Y. Times about this case - and I have written to Senator Williams

---

Please excuse my violating protocol -

LETTER #2

Le "Beau Rivage"
Lausanne-Ouchy
(October 25 1973)

Judge Carter -

I have written a letter to Judge Gerfein [sic] - please your honor, forgive my violating protocol - but I have been terrorized by an Assistant U.S. Attorney named Ira Sorkin - and his side-kick, Tom Doonan, I stand indicted by Mr. Eberhardt on a case that will be heard before your Court - Mr. Eberhardt has acted in a proper way -

But Mr. Sorkin has insisted, using words and methods beyond rational belief - that I tape and entrap a number of prominent people - "or he will crucify me" - tapes made without court authorization -

Unless I become his professional informer - Mr. Sorkin warned me - he would continue naming me in what he referred to as his "frivolous" indictments -

He has badgered my family - my friends - has insisted seeing me without a lawyer - on many - many occasions -

When I finally exploded and told him that I would write to the court he said - "Don't bother - it won't help"

Respectfully,

JERRY ALLEN.

P.S. Among those he wanted me to tape were Senator Javits - and Senator Harrison Williams -

He also insisted - in a rage - that I tape conversations with my own lawyer Marty Frank - (Mu 7-8930)

I will stand befor you, Your honor, and swear as to the above statements -

I realize the unorthodoxy of writing directly to you - but I am at the breaking point - so much so, that I'm almost afraid to come home -

Again, my apologies

JERRY ALLEN

LETTER #3

Hotel Nova-Park
wo man sich trifft
Badenerstrasse 420,
Zurich
Wednesday

Dear Mr. Eberhardt:

Contrary to what you may have heard - Ill be back in sufficient time to face trial - (Coatings etc.) or whatever else occurs -

I have gone on record, perhaps defying protocol, as to Mr. Sorkin's behavior -

While it is understandable that a prosecutor seek the help of defendants - there should be reasonable limits as to the kind of pressure ... or illegal means ... utilized to coerce a defendant - particularly the use of tapes - and other entrapment techniques -

If justice is served by Orwellian means, we have then progressed, but a few yards from Plato's cave -

I cannot fault your behavior - I will fight your charges - as best I can -

It may be ironic to note, or predict, that Mr. Sorkin has the kind of vigilante mentality that will ultimately manifest itself - when he turns around his collar - and enters private practice - attacking the very methods he once utilized so recklessly -

When Foley Square is nothing more than an archeological ruin, historians will ask "What manner of man - or men - administered justice there?"

A philosophical question - that I'm certain eludes Mr. Sorkin and his colleagues -

They are too busy seeking headlines -

JERRY ALLEN

LETTER #4

Hotel Nova-Park
wo man sich trifft

November 26, 1973

Dear Sir:

I initially wrote to you from Lausanne but apparently no one could decipher my handwriting.

I am under two indictments, both, in a sense, are inter-related. (Southern District) ... Ira Sorkin is the Assistant attorney on one case: Mike Eberhardt; the other case. My remarks are directed only towards [crossed out words] Mr. Sorkin.

There is a sham practiced in Federal Courts wherein a defendant is asked by the Judge, as routine, "Have you been promised anything or threatened by the U.S. attorney?" In virtually, every case, the answer is a meek "No..Sir."

When Mr. Sorkin initially called me down to Foley Square to seek my co operation in a number of SEC matters, he introduced me to a Tom Doonan, an investigator with the SEC. To say that the tactics they used, and continue to use, are Orwellian, is understatement. Mr. Sorkin asked me to "tape" my own attorney, Marty Frank. He also repeated a demand, as did Doonan, that I "set [crossed out words] up and tape" a number of persons on their "hit parade" ... among them Senator Harrison Williams, and [crossed out words] other prominent people with Wall Street orientations.

When I asked if they would secure a court order, they smiled as they replied.."We don't need court orders.....we want results." When I balked a series of pressure unfolded; telephone calls to my answering service and friends, calls made by both of them, calls made at all hours, they left embarrassasing [sic] messages.

At one point when I adamantly refused to co-operate with them on their level... Doonan

warned... "What would happen if, "by chance," someone found narcotics in your car, your apartment.." what would you do then..if we "arranged" an "arrest" on the spot? Since my strongest addiction is Diet Pepsi, even Sorkin blanched at the suggestion.

It is understandable that a government attorney should seek the cooperation of defendants, but I do not believe that their investigative behavior is above the law. Sorkin warned that I would be named in an SEC indictment, even though, to quote him "At best...it is a spurious case... we are naming you to break you down." And we'll name you over and over until you tape the people we want."

I am not a paragon of virtue. In 1968 I was indicted for having received $700 to "ghost write" a stock market letter that was never published. When I refused to co-operate with the government: they named me in a second case charging I had been paid $150. The second was thrown out of court by Judge Tyler. Before the first case was tried, the government, [unclear] asked me to tape Roy Cohn: I refused: instead I gave Mr. Cohn a sworn affidavit stating that the government wanted me to trap and tape him. He used the affidavit and subsequently won his case.

[Crossed out words]

When I told Mr. Sorkin that I would contact your agency and that I would write directly to the Judge he stated, "If you contact the ACLU, I'll break you [unclear] one way or another."

I am not being poetic or dramatic. I will submit to a lie detector test. I doubt if Mr. Sorkin will.

Sorkin also "advised" me that he had embarrasing [sic] information as to my social life that he would "leak" to my family. He met with me

.. alone..at the Waldorf Astoria.... again soliciting my assistance: and asking for something which I cannot spell out in this letter.

I am in Switzerland and my case [crossed out] is due for trial on December 17. I am frankly terrified that when I return, Doonan will live up to his threat of "planting" some narcotics on my person...

This week, my former partner, Philip Stoller, was arrested at Kennedy Airport by Sorkin, Doonan and a Marshall, upon his return to the States from Switzerland. He was informed that he was under indictment for alledegly [sic] lying at an SEC hearing. It may be interesting to note that Sorkin forced, not only Mr. Stoller, but his wife and son to surrender their passports. He asked for $750,000 bail.....which may be a clude as to Sorkins sense of balance.

He refused to permit Mr. Stoller to call his attorney from the airport, by the time they arrived at Foley Square; his attorney had left for Thanksgiving. And Mr. Stoller, who has never been indicted or [convicted?] of a crime, was kept for two days in the House of Detention.

I am not a vestal virgin. But if the government can abide with the Gestapo tactics of some of their attorneys, then we are still in Plato's cave.

How much longer will the perjurious sham of a defendant parroting "No Sir" when asked if he was "threatened," be permitted as routine?

At best, I am condensing months of conversations with Sorkin and Doonan. Space limitations preclude a detailed resume. I received a long distance call from their office two weeks ago: someone...(I don't believe it was Sorkin)... warned.."If you don't come back and turn States evidence ...we will see to it that your former wife will lose her job." Before I could reply they hung up...

Respectfully,

JERRY ALLEN

LETTER #5

Ira Sorkin
SEC Office
Room 301, Federal Building
Foley Square
New York, New York

I have made many foolish mistakes in my life - mainly emotional
I am tired of defying common sense

I must be careful what I write-
I have no lawyer here
I am being charged with issuing - last year - a check to a Geneva jeweller that did not clear - around $2,000 - with interest

I want to work with you 100% - no gambits - no obtuse [unintelligible] -

Everyone has let me down - but not your office -

The other night, I heard [illegible] - and part of the Miami-Pittsburgh football game -

I am a Navy "vet".

I am not a cornball - but I cried -

I need to be on the moral side - the life of a busted down boulvardier is a fiction -

I miss my wife and children ... and I want to purge myself of all sophistry -

I want to come back - but please ... not the kind of reception committee that greeted Phil - You can hold the green book forever -

JERRY ALLEN

LETTER #6

Ira Sorkin
Room 301
U.S. Court House
Foley Square
Federal Building
New York, N.Y.

The judicial process has been somewhat slowed down by the holidays; I am awaiting funds to pay my debts here. There is something unheroic about my current status. Samson went down in the temple of Dagon; Hector was destroyed before the walls of Troy; Hamlet died in the presence of the Royal Court; and Jerry Allen squats patiently in a Swiss jail because of a bank overdraft. Incidentally, I telephoned the jeweler in question at least two weeks before my arrest stating that I would make the check good. I have met with Mr. Rand of the State Department and told him that I would not oppose extradition. He stated that your office would ask for minimal bail; since I voluntarily requested going back. For years, I took on the veneer of an American abroad; preferring French wine; Italian sopranos; and German doctors. Although I have been in over thirty countries, my instincts can't be [illegible]. I would gladly trade a dinner at Maxim's in Paris, for a Nathan's frankfurter, and a day at Shea Stadium to a stroll on the Champs-Elysee - The pressure being exerted upon me by certain people in the States - "asking" me not to return has taken on Gargantuan proportions. I have never operated on D'onofria's scale, so why should I become a world gypsy? An so a toast, to the "Young Man That Was". To his dreams, for they were rainbow-colored; to his appetites, for they were strong; to his blunders, for they were huge; to his beloved, for she was sweet; to his pain, for it was sharp; to his time, for it was brief. In the Lotus Land where the sunlight fades not where the flowers are spring flowers, and the grass is an April green for ever, he still walks his jaunty, trusting way. God pity us all - with what precious coins have we bought our philosophy. Bring me back. (Thanks).

JERRY ALLEN

LETTER #7, TELEGRAM TO IRA SORKIN

10/21/73

BACK ON OCTOBER 30 SECURED NECESSARY MATERIAL
UNDER EXTRAORDINARY PRESSURE TO PREVENT TRIP

I certify that a copy of this Brief and Appendix was served today by hand on the United States Attorney, Southern District of New York.

June 10, 1974